

R.D. # 0004-04
Bergen County, NJ

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22**

**BERGEN COUNTY COMMUNITY
ACTION PROGRAM, INC.**

Employer

and

CASE 22-RC-12440

**SERVICE EMPLOYEES
INTERNATIONAL UNION,
LOCAL 617, AFL-CIO, CLC**

Petitioner

SUPPLEMENTAL DECISION AND ORDER¹

I. INTRODUCTION:²

On March 24, 2004, the Acting Regional Director issued a Decision and Direction of Election (DD&E) in the above-captioned case. On April 20, 2004, the Board granted the Employer's Request for Review and remanded this matter to the undersigned to reopen the hearing in order to take testimony from the Employer's Director of Food Services, who was not an available witness at the initial hearing in

¹ The Petitioner's facsimile transmission of its brief dated June 2, 2004, is rejected as it fails to comport with Section 102.114(g) of the Board's Rules and Regulations, that provides, *inter alia*, that briefs are unacceptable if submitted by facsimile transmission. A brief filed by the Employer was considered.

² The Employer raised an argument in its brief concerning the adequacy of the showing of interest submitted in support of the petition. The sufficiency of the Petitioner's showing of interest is an administrative matter not subject to litigation. *O.D. Jennings and Company*, 68 NLRB 516 (1946).

this matter held on March 2, 2004, and to issue a supplemental decision. Pursuant to the remand order, a hearing was held before a hearing officer of the Board.

On remand, the Employer continues to contend, contrary to the Petitioner, that kitchen specialists are supervisors within the meaning of Section 2(11) of the Act. For the reasons described below, I find that kitchen specialists are not supervisors and I will include them in the unit found appropriate in this matter.

At the initial hearing, the parties also differed as to whether individuals classified as trainees were employees within the meaning of Section 2(3) of the Act. In the initial DD&E, it was concluded that they were employees and properly included in the unit. At the remanded hearing, the parties stipulated that the three trainees at issue are cooks and should be included in the unit. That stipulation is hereby approved.

II. FACTS:

A. Employer's Operations

The Employer is engaged in operating a federally designated anti-poverty agency in Bergen County, New Jersey which serves approximately 18,000 people a year. It employs approximately 220 individuals in various programs including SPICE, a culinary training program.

The SPICE program provides breakfast, lunch and snacks for pre-school age children in various Bergen County locations for Head Start programs administered by Bergen County Community Action Program Inc. ("BCCAP"). It also occasionally caters events for various Bergen County agencies. The program has kitchen and food

preparation areas at three different locations in Bergen County: two in Hackensack (Kansas Street and Second Street) and one in Bergenfield.

The program employs a full time staff of approximately 13 employees that include cooks, kitchen specialists, drivers and a Director of Food Services.³ All employees work a five-day, 40-hour week, are paid an hourly rate around \$8.00 an hour and are eligible for health insurance benefits.⁴ The record reveals that kitchen specialists work side by side with cooks and drivers and share the same primary duties, such as cooking, cleaning and serving food.

The record reveals that meals are prepared and served at the three kitchens noted above (Kansas Street, Second Street and Bergenfield). Meals prepared at these kitchens are also transferred by cooks and drivers to four other unspecified locations that employ only cooks, who perform reheating and serving food functions. The record further discloses that a kitchen specialist is employed at the Kansas Street location with approximately three other employees and another kitchen specialist at the Second Street kitchen with four other employees. Bergenfield has no kitchen specialists, only two cooks. The record is unclear as to where the third kitchen specialist is employed, although it appears that the Kansas Street kitchen may at times have two kitchen specialists on staff.

The only witness to testify at the remanded hearing was the Employer's Director of Food Services, Brett Boon. Mr. Boon is directly in charge of all aspects

³ The parties stipulated that the Director of Food Services is a supervisor under Section 2(11) of the Act. He is, therefore, excluded from the unit found appropriate here.

⁴ At the remanded hearing, the Director of Food Services testified that kitchen specialists earn more than other unit employees without specifying either the amount or the percentage differences.

of the kitchens and their staffs, including hiring, discipline, evaluations, choosing vendors, catering, ordering, checking food, teaching and reviewing invoices and time and attendance records. Boon visits each kitchen at least twice per week and is in daily telephone contact with kitchen specialists and/or cooks at each location.

B. Kitchen Specialists

Boon testified that kitchen specialists are responsible for overseeing the kitchens at the three preparation sites involved in this matter, preparing food, cleaning kitchens and ordering food products. There is no evidence in the record that kitchen specialists exercise any independent judgment in conducting any of those tasks. Like other employees, kitchen specialists use a sign-in sheet to document their arrival and departure times. Kitchen specialists do not attend managerial meetings. The Employer uses a four-week menu cycle that is prepared by the Boon and followed by the kitchen staff in preparing meals.

The Employer contends that kitchen specialists are involved in the hiring, disciplining and evaluating processes and the scheduling of employees, indicia which the Employer asserts support a finding that kitchen specialists are supervisors within the meaning of the Act. I will address these four areas below:

1. Hiring

The record reveals that kitchen specialists do not possess the authority to hire. Further there was no probative evidence presented at the hearing that kitchen specialists recommend the hiring of workers. In this connection, the record described the kitchen specialist's role as assisting the Boon in "arriving at decisions related to hiring." No documents or specific examples of these actions were provided. As to

the Employer's assertion that kitchen specialists interview potential employees, the record failed to detail the extent of this involvement in the hiring process, except that they advise the Boon concerning the compatibility of the potential employee. In this regard, Boon testified that he alone interviews and hires employees. He further stated that he would "eventually" have the prospective employee meet with a kitchen specialist to see whether there will be "a good fit or not." This input, according to Boon, "is an influence on me choosing whether this person is going to be employed."

2. Discipline

The Employer maintains a four step disciplinary process involving verbal warnings, written warnings, suspension and discharge. The Employer asserts that kitchen specialists have the authority to issue verbal warnings without prior authorization. In support of this assertion, Boon testified that approximately a year ago, former kitchen specialists issued verbal warnings to two employees concerning lateness. The circumstances surrounding these verbal warnings were not detailed in the record nor was there evidence that they were independently administered.

Boon also testified that he reviewed and issued under his own signature a written warning to an employee drafted by a former kitchen specialist. Boon acknowledged that this former kitchen specialist merely documented and reported the employees' attendance problem to him and Boon made the decision to issue a written warning.

There is no evidence that any of the three current kitchen specialists has had any involvement in discipline during the past year. In this regard, the Employer

acknowledges that a recommendation not to discipline an employee recently made by a current kitchen specialist was not followed.

3. Evaluations

Though the Employer asserts that kitchen specialists participate in annual evaluations of employees, the extent and the effectiveness of their participation in this process were not detailed. In this regard, Boon testified that he speaks to kitchen specialists prior to his preparing written evaluations for employees, in which he discusses areas in which improvement is needed, as well as other issues. The record was devoid of evidence of specific recommendations made by kitchen specialists that affected evaluations. Further, Boon acknowledged that he can prepare the evaluations based on his own observations of employees but finds it useful to receive input from kitchen specialists. As noted above, there are at least four cooks employed at four other locations where there are no kitchen specialists. These cooks are admittedly supervised directly by Boon.

4. Scheduling

There is no probative evidence that kitchen specialists schedule employees. It is undisputed that kitchen specialists are not involved in scheduling vacations or time off. The record reveals that overtime is voluntary and that kitchen specialists assertedly request employees to work overtime. The record is not clear as to how often kitchen specialists request others to work overtime or under what circumstances. In any event, it is undisputed that kitchen specialists cannot require employees to work overtime.

III. ANALYSIS & CONCLUSION

Section 2(11) of the Act defines a “supervisor” as: [A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

As the Board has noted in numerous cases, the statutory indicia outlined in Section 2(11) are listed in the disjunctive, and only one need exist to confer supervisory status on an individual. See, e.g., *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989); *Ohio River Co.*, 303 NLRB 696, 713 (1991); *Opelika Foundry*, 281 NLRB 897, 899 (1986); *Groves Truck & Trailer*, 281 NLRB 1194, n. 1 (1986). However, mere possession of one of the statutory indicia is not sufficient to confer statutory status unless such power is exercised with independent judgment and not in a routine or clerical manner. *Hydro Conduit Corporation*, 254 NLRB 433, 437 (1981).

Section 2(11) of the Act sets forth a three-part test for determining supervisory status. Employees are statutory supervisors if they hold the authority to engage in any of the 12 listed supervisory functions; their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and their authority is exercised "in the interest of the employer." *NLRB v. Kentucky River Community Care, Inc., et al.*, 532 U.S. 706, 713 (2001).

The burden of proving supervisory status lies with the party asserting that such status exists. See *Kentucky River*, above; *Michigan Masonic Home*, 332 NLRB 1409 (2000). Lack of evidence is construed against the party asserting supervisory status. See *Michigan Masonic Home*, above. “Whenever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, above at 490. Mere inferences or conclusionary statements without detailed, specific evidence of independent judgment are insufficient to establish supervisory authority. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer has provided little direct evidence to establish that kitchen specialists are supervisors under the Act. In this regard, there was no evidence offered of the actual exercise of authority and independent judgment. The facts adduced at the hearing made clear that kitchen specialists could not hire, fire or direct employees. As to their participation in the evaluation and hiring processes, the record does not support the Employer’s assertions that kitchen specialists exercise sufficient authority in these areas to warrant a conclusion that they are supervisors within the meaning of the Act. In this regard, there is no record evidence as to whether their input in the evaluation and hiring processes is meaningful in establishing an exercise of independent judgment in these areas. *Wal-Mart Stores, Inc.*, 335 NLRB 1310 (2001).

I find additionally that kitchen specialists play no significant role in the discipline of employees. The record contains no evidence that kitchen specialists

have ever recommended that personnel actions should result from the performance or misconduct they allegedly report. Moreover, Boon testified that he conducts investigations of negative reports and he alone determines what course of action should be taken. Boon testified, briefly, that kitchen specialists verbally reprimand other employees. The record contains no evidence that oral reprimands by kitchen specialists are noted in the file or used for evaluations. Boon acknowledged that none of the current kitchen specialists has issued oral warnings in the past year. On the contrary, the Employer concedes that it rejected a recommendation regarding discipline made by a kitchen specialist in the recent past. Therefore, I find that kitchen specialists are not supervisors by virtue of such alleged reprimands. The fact that one employee may point out deficiencies in performance of another employee does not necessarily make that employee a statutory supervisor, especially where, as here, Boon conducts his own investigation of the event and decides what to do. *Crittenton Hospital*, 328 NLRB 879; *Express Messenger Systems*, 301 NLRB at 653-654.

Absent detailed and specific evidence of independent judgment, mere inference or conclusionary statements, without supporting evidence, are insufficient to support supervisory status. *Quadrex Environmental Co.*, 308 NLRB 101 (1992); *Sears Roebuck & Co.*, above.

As noted above, there is no probative evidence that kitchen specialists have the authority to schedule employees, grant time off or compel overtime.

Based upon the above and the record as a whole, noting that the kitchen specialists share similar terms and conditions of employment as other unit employees

and the absence of evidence that they have independent authority as defined in Section 2(11) of the Act, I find that they do not possess any indicia of supervisory status that would warrant their exclusion from the unit. *Spector Freight System, Inc.*, 216 NLRB 551 (1975); *North Shore Weeklies, Inc.*, 317 NLRB 1128 (1995).

IV. ORDER

I note that an election by secret ballot was previously conducted by the undersigned among the employees in the unit found appropriate and the ballots were impounded. My conclusion herein that the kitchen specialists are not supervisors within the meaning of the Act is consistent with the conclusion in the initial DD&E issued in this matter, on the basis of which the previous election was conducted. Accordingly, it is **ORDERED** that at a time and place to be established by a Board agent, the ballots previously impounded shall be opened and counted and a Tally of Ballots issued.

VI. RIGHT TO REQUEST REVIEW

Under the provision of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. The Board in Washington must receive this request by **June 17, 2004**.

Signed at Newark, New Jersey this 3rd day of June 2004.

/s/Gary T. Kendellen

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